INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	11

CITATIONS

Cases:

Bowles v. *Willingham*, 321 U. S. 503	5
Davis v. *Newton Coal Co.*, 267 U. S. 292	5
Lord Mfg. Co. v. *United States*, 84 F. Supp. 748	9
Perry v. *United States*, 294 U. S. 330	6
Seaboard Air Line Ry v. *United States*, 261 U. S. 299	8
United States v. *Commodities Trading Corporation*, No. 156, October Term, 1949	2
United States v. *Cors*, 337 U. S. 325	9
United States v. *Delano Park Homes*, 146 F. 2d 473	5
United States v. *New River Collieries Co.*, 262 U. S. 341	5
United States ex rel. T. V. A. v. *Powelson*, 319 U. S. 266	7

Statutes:

Emergency Price Control Act of 1942, 50 U.S.C. App. 922:	
Section 202	6
Requisitioning Act (Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181, and the Act of June 30, 1943, c. 181, 57 Stat. 271)	2

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, ET AL.,
PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 23-30) is reported at 83 F. Supp. 356.

JURISDICTION

The judgment of the Court of Claims was entered on April 4, 1949 (R. 30-31). The petition for a writ of certiorari was filed on July 5, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Petitioners have listed seven questions presented (Pet. 25-26) and have specified 61 errors (Pet. 11-23, 31-36), all of which, we submit, are reducible to the single question:

Whether the Court of Claims erred in failing to award petitioners 22 cents per pound for the whole black pepper requisitioned from them.

STATUTE INVOLVED

The pertinent portions of the Requisitioning Act, as it read at the time of the requisition in question, are set out at pp. 2-4 in the Government's petition in No. 156, this Term.

STATEMENT

Petitioners seek review of the same judgment as that involved in *United States* v. *Commodities Trading Corporation,* No. 156, this Term. The "Statement" in the Government's petition, based on the special findings of fact of the Court of Claims, is equally applicable here, and reference thereto is respectfully made. To that "Statement" the following findings, relevant to the present petition, should be added:

Finding 18 (R. 18-19):

> During the years 1943 and 1944, which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made

up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent.

This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound.

Finding 23 (R. 21):

Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.

Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.99		

These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established

in that schedule, i.e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper.

ARGUMENT

The answer to the question raised by petitioners —whether the Court of Claims erred in not awarding petitioners 22 cents per pound for the whole black pepper requisitioned from them—largely depends on facts, and asserted facts and circumstances, which are unique to a taking of whole black pepper, and which petitioners contend the lower court has not found in their favor. No general issues in the field of eminent domain are presented, and the particular factual contentions urged do not warrant review by this Court. In contrast, the Government's petition in No. 156 raises the general question of the place of a validly established OPA ceiling price in the determination of just compensation—a matter, we submit, of widespread importance.

1. To support their position here, petitioners rely on seven factors (see Pet. 3-4), and they assert the Court of Claims not only failed to accord proper weight to those factors but also failed in several instances properly to find the facts relating to them. The many alleged errors in regard to the court's consideration of these seven elements—especially the failure to find the facts as petitioners see them (Pet. 14-16, 17-23 (Specifications of Errors Nos. 9-18, 30-61), Pet. 33-35, 36 (Second Specifica-

tions of Errors Nos. 9-18, 30)), and the rulings on the admissibility of evidence (Pet. 17, 36 (Specifications of Errors Nos. 27-29))—clearly present no problems meriting certiorari.

a. While it made findings of fact as to the 21 cent market price of Indian pepper delivered at New York (see *supra*,, pp. 3-4) and the net price for whole black pepper used in producing synthetic or imitation pepper (*supra*, pp. 2-3), two of the factors urged as supporting petitioners' claim (Pet. 3, 4-6, 9-10, 46, 47-48, 60-62, 64-65), the Court of Claims properly did not accord these factors any weight.

(1). Petitioners concede (Pet. 5, 47), and the Court of Claims found (R. 21), that the Indian pepper was not actually imported into the United States because of valid restrictions imposed by the Office of Price Administration, and no Indian pepper was sold here. Cf. *United States* v. *Delano Park Homes*, 146 F. 2d 473 (C. A. 2); *Bowles* v. *Willingham*, 321 U. S. 503, 517. The price of that pepper, therefore, was not, as petitioners claim (Pet. 47), "probably the fairest and most tangible basis for allowance to plaintiffs"; on the contrary, it had no relationship whatever to petitioners' damages or to the value of the requisitioned pepper at the time and place of taking in the United States, since American buyers and sellers could not lawfully avail themselves of this Indian pepper. See *United States* v. *New River Collieries*, 262 U. S. 341, 344; *Davis* v. *New-*

ton Coal Co., 267 U. S. 292, 301; *Perry* v. *United States*, 294 U. S. 330, 354-358; cf Brief for the United States, in *United States* v. *The Toronto, Hamilton, and Buffalo Navigation Company*, this Term, No. 39, pp. 32-39.

(2). Comparison with the net price for whole black pepper used in producing imitation black pepper similarly has no place here, for imitation black pepper is a different commodity from whole black pepper, and like whole black pepper, was subject to an OPA price ceiling. Imitation pepper was a new product, its production a new business, and hence the ceiling price fixed for it as a newly manufactured produce was established on a different basis from those for products traded prior to the imposition of price controls. See Section 202 of the Emergency Price Control Act of 1942, 50 U. S. C. App. 922.[1]

b. As to the other factors petitioners mention, the Court of Claims did consider them, among others, in determining just compensation, and, we believe, accorded them more than sufficient weight.

(1). The court, in considering "the price at which it was reasonable to estimate that said pepper would have sold in the open market in New York in May 1944, had there been no war" (Pet. 3), accepted in part the theory that there was a

[1] Despite the 30 cents per pound price petitioner now says it could have secured by manufacturing imitation black pepper (Pet. 3, 65), the record contains nothing to indicate that petitioners ever engaged in this business, or could actually have done so.

fairly constant and therefore predictable movement of black pepper price, and made allowance for this factor in its award of 15 cents a pound (R. 26, 22-23, 27).[2] This theory, however, does not accord with the facts as shown by petitioners' own operations, for under this theory the price of whole black pepper should have started to rise in 1939, whereas, in fact, it continued to fall (R. 15). It was, therefore, impossible to predict with any accuracy what the price of pepper would have been in 1944 if there had been no war, and if error was committed by the Court of Claims it was wholly in petitioners' favor.

(2). The factor of "cost plus a reasonable profit for holding the pepper for an average period of eight years" (Pet. 4) is no more than an attack upon the court's finding of a cost of 12.7 cents per pound, as too low. That cost, petitioners claim (Pet. 66), should be "built up" by the inclusion of hypothetical costs plus a profit for each year that they held the pepper. Not only does just compensation include only actual costs, but it requires that the owner be awarded the value of his property, not a profit on it. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S.

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[2] The finding of the Court of Claims on this point is not as strongly stated as petitioners' version. The court found (R. 22-23):

> * * * If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States.

266, 281-282. Indeed, the cost of the pepper was substantially below even the amount found by the Court of Claims, as is indicated by OPA's cost computations on the more realistic "first in, first out" basis, and by petitioners' offer to sell 1,000,000 pounds to the War Department at 9¾ cents per pound (R. 20), as well as their subsequent agreement with OPA to sell 7,000,000 pounds at 10 cents per pound (R. 19).

(3). The remaining three factors (see Pet. 3)[3] are merely different formulations of the so-called "retention value" on which the Court of Claims in large measure predicated its finding of just compensation (R. 25, 27). As we point out in the Government's petition in No. 156 (pp. 21-23), not only does the use of "retention value" as a measure of just compensation violate the fundamental principle that just compensation is to be determined at the time of taking (see *e.g. Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306), but its use here results in compensating petitioners for the pepper's special value to them for speculative purposes. The retention value of pepper at that time reflected the extreme scarcity of pepper resulting

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[3] "(b) the price which, in May 1944, it was reasonable to expect could be obtained for Whole Black Pepper at the end of the War, less carrying charges to that time, pepper being non-perishable and easily stored";

"(c) the price which plaintiffs-petitioners could actually have obtained for the pepper at the time of decontrol, less carrying charges from May 1944 to that date"; and

* * * * * * *

"(e) the replacement cost—more than 50¢ per pound".

from our being cut off by the war from our foreign sources of supply. Such a value does not represent "what a 'willing buyer would pay in cash to a willing seller,' *United States* v. *Miller* [317 U. S. 369], 374, in a fair market" *United States* v. *Cors*, 337 U. S. 325, 333. As stated in the *Cors* case (337 U. S. at 334), such value is "a hold-up value, not a fair market value" and hence, far from being a proper measure of just compensation, should not have even been considered as an element in its determination.[4] Nevertheless, the court below did consider this factor and made a judgment, in the individual circumstances presented to it, as to the amount of "retention value" for which compensation should be made here. Petitioners' limited disagreement with the extent of the Court of Claims' specific determination of the amount of this type of value in this particular case presents no ground for review.

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[4] In *Lord Mfg. Co.* v. *United States*, C. Cls. Nos. 46573, 47328, 84 F. Supp. 748 (decided July 11, 1949), the Court of Claims —in upholding contract repricing orders administratively issued by the War and Navy Departments during the war— heavily stressed the close connection between the fact of a wartime emergency and the determination of just compensation, and refused to accede to the monopoly demands of the contractor in that case. "Many other facts might be recited as contributing during the emergency to the question of what constitutes just compensation, but certainly it would not be fair when the price of food, the wages of labor and the prices of all other materials going into the war effort were being controlled, to permit a market value based on what almost amounted to a monopoly, plus a shortage of material elements, to constitute the measure of just compensation * * * the doctrine that prices may be based on what the traffic will bear has no place in our national economy at such a time". 84 F. Supp., at 755-756.

2. The fact that the instant petition and that of the Government in No. 156 seek review of the same judgment of the Court of Claims does not justify the granting of the writ at petitioners' plea. As we have shown above, petitioners' contentions that the Court of Claims erred in not awarding them 22 cents per pound for the requisitioned pepper are based primarily on factual matters. These factors are pertinent only to petitioners' argument that they were entitled to 22 cents per pound rather than 15 cents, and bear only remotely on the broad legal question raised by the Government's petition, i.e. whether OPA ceiling prices may be a proper measure of just compensation for property requisitioned for war purposes. Indeed, the issues involved here arise after the question presented in No. 156 is disposed of, and are reached only if that question is resolved adversely to the Government's position. Even in that event, petitioners' issues are not of the character meriting decision by this Court.

CONCLUSION

The judgment awards petitioners more than they are entitled to. The question raised is largely factual and presents no issue of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

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